

SOUTHWESTERN BELL'S RESPONSE TO THE DEPARTMENT OF JUSTICE EVALUATION

The Department of Justice's Evaluation of SBC's section 271 Application for Texas is striking for what it does not do. Although lauding the Texas PUC in general terms, the Evaluation does not give any significant attention to the detailed analysis and findings of the Texas PUC, with which the Department is now disagreeing. The Department does not discuss (or dispute) the competitive benefits for Texas consumers of finally permitting SBC to provide long distance competition in Texas. It does not discuss (or dispute) SBC's compliance with most of the items on the 14-point competitive checklist. It does not discuss (or dispute) SBC's compliance with the requirements of section 272. Finally, the Department does not dispute that local competition in Texas amply satisfies the requirements of section 271(c)(1)(A), or that there is – in the Department's oft-spoken phrase – “gas in the pipeline.” Nor could it, when, by the Texas PUC's count, competing local carriers are serving a million lines in SBC's Texas service areas.

The principal focus of the Department's Evaluation is on a handful of the approximately 1900 separate performance measures and sub-measures that collectively are designed to demonstrate whether SBC is providing hundreds of different CLEC competitors with nondiscriminatory access to its network. Even here, the Department does not dispute that SBC has met or exceeded the Texas PUC's performance standard for the overwhelming majority of those performance measures. Rather, the Department focuses on ten performance measures concerning access to DSL-capable loops. The Department concludes that these ten performance measures – which concern less than 1000 out of the 166,000 total loops ordered from SWBT – fail to demonstrate that SBC is providing nondiscriminatory access to DSL-capable loops. The Department then sets itself in opposition to this Commission. Notwithstanding the Commission's contrary determination in its New York Order, the Department advises that establishment of a separate advanced services affiliate provides no substitute for a full numerical showing of nondiscrimination with respect to DSL-capable loops. The Department therefore recommends that SBC's Application should be denied.

This recommendation puts the Department directly at odds with the Texas PUC, which has specifically explained that “[o]ne of the most thoroughly examined issues relating to the provisioning of unbundled local loops in the Texas 271 proceeding was nondiscriminatory access to xDSL-capable loops.” Texas PUC Evaluation at 60. The Texas PUC found, “based on several factors,” that SBC “ha[s] met its obligation under Checklist Item 4 to provide access to unbundled xDSL-capable loops.” *Id.* These factors included SBC's “current legal obligations, performance, and commitments made [and implemented] during the 271 proceeding, as well as SWBT's obligations under both the SBC/Ameritech merger conditions and the xDSL arbitrations in Texas Commission Docket Nos. 20226 and 20272.” *Id.* (Internal citation omitted). As detailed below, the Department's analysis touches on only a few of these factors considered by the Texas PUC, and the Department's analysis is seriously deficient even as to those.

The Department secondarily discusses SBC's provisioning of “hot cuts” to CLECs. This discussion misapplies the Commission's New York Order and misstates both Bell Atlantic's

performance in New York and the governing standards set by the FCC and the Texas PUC. Once again, moreover, the Department virtually ignores the contrary conclusions of the Texas PUC, which provided a detailed recitation of the steps it took to investigate this issue. These steps, which the Department of course was not in a position to replicate, included oversight of carrier-to-carrier testing, a performance review in November 1999, a “two-track evaluation of the validity of [performance measures],” analysis of data showing “compliant performance” in actually provisioning hot cuts, review of raw and reconciled data to confirm this, and establishing new performance measurements to capture additional aspects of the hot-cut process. Texas PUC Evaluation at 57-59.

The Department further discusses, without documenting, other possible “shortcomings” in SBC’s wholesale performance in the areas of UNE-loop order processing, interconnection trunking, and the UNE Platform. The Department is also critical of the independent testing of SBC’s systems commissioned by the Texas PUC and conducted by Telcordia. But, putting aside the rhetoric, the only express grounds for the Department’s recommendation that the Application be denied are (1) alleged “deficiencies” in the provisioning of DSL-capable loops and (2) a faulty comparison of SBC’s hot-cut performance to Bell Atlantic’s performance in New York. After four years of intensive work in Texas to resolve the hundreds or thousands of issues implicated in a section 271 filing, the Department finds we are down to these two issues.

This appendix specifically responds in detail to each of the Department’s criticisms, both general and specific. We address the issues regarding DSL and hot cuts. While the other issues do not rise to the same level of concern in the Department’s view and are not the basis for the Department’s Evaluation, we address them as well. We believe that the Department’s criticisms are unfounded and unjustified, and that they do not form an adequate basis for denying SBC’s Application. In nearly all cases, the isolated CLEC anecdotes that the Department adopts have already been thoroughly considered and resolved by the Texas PUC through open procedures and substantial and verifiable empirical evidence. In many cases, the Department simply got it wrong – ignoring or misstating relevant performance results, critical facts, or FCC holdings that render its conclusions unreliable, as well as the practical reality that perfect evidence may not be available (particularly for new services).

We do not claim that SWBT’s performance has been perfect. But perfect performance is not the statutory standard. Even where individual performance measures have fallen short for a period of time, that must be put in the context of the overwhelming majority of nearly 1900 performance measures that SWBT has met or exceeded. More importantly, one must recognize that performance measures are not an end in themselves. They are a means of ensuring that local markets in Texas are fully open to competitors. They provide early warning of possible problems and a method of identifying any shortcomings that arise in a fast-changing marketplace, but do not supplant other safeguards in Texas such as open enforcement dockets, carrier forums, monthly reviews of SBC’s performance data, and twice-yearly reviews of the performance measures themselves. The Texas PUC recognized the comprehensive nature of the section 271 inquiry when it undertook an exhaustive two-year investigation – complete with collaborative proceedings at which SBC and the CLECs presented every relevant fact – and then concluded that Texas local markets are “irreversibly open.” Texas PUC Evaluation at 1.

CLECs' striking success in capturing about 1 million lines in the marketplace (as determined by the Texas PUC) confirms that perception.

The Department of Justice was supposed to play the role in this proceeding of an independent expert agency examining all the relevant facts. But there is a decided absence of balance in the Department's exclusive focus on isolated negatives among the vast array of performance measures. The Department of Justice was itself involved in the Texas PUC's two-year review of SBC's Application. The Department helped formulate the ground rules for the Texas proceedings. Its attorneys attended many of the hearings and collaborative proceedings, and they regularly communicated with Texas PUC staff. The Department established a set of 66 performance measures that were included in the 131 adopted by the Texas PUC. The Department has received SWBT's performance results on a monthly basis since March 1998. Each month, SBC solicited the views, suggestions, or criticisms of the Department, without any response. Throughout, the Department thus had ample opportunity to suggest additional testing, additional investigation, or changes in performance measurements, systems, and processes.

The Department's evaluation reflects none of this lengthy process. It is a one-time snapshot of only a fraction of the relevant data, that treats allegations as facts. The Department readily echoes CLEC complaints, while ignoring that most of them were already reviewed and rejected by the Texas PUC. The Department neither conducts its own independent investigation to determine their validity, nor defers to the exhaustive investigation already conducted by the Texas PUC. But even when the complaints adopted by the Department are taken at face value, they are just a hodge-podge of disparate allegations. The CLECs themselves cannot agree on what critical sticking points to competitive entry exist in Texas. That in itself indicates there are none. There are isolated issues that have been, and will continue to be, addressed. But there is no evidence that CLECs do not have a full and fair opportunity to compete against SBC in local markets in Texas. That is what the statute requires. That is what the Texas PUC found. And that is what the evidence shows.

I. THE DEPARTMENT'S GENERAL CONCERNS

OSS Testing

In New York, an absence of actual commercial usage made it necessary to test electronic OSS interfaces in a mock setting involving the creation of an artificial CLEC. One of the problems with that method, as Bell Atlantic's third-party tester frankly acknowledged, was that the mock CLEC "at times it received better treatment from Bell Atlantic than that of an ordinary carrier." See New York Order, CC Docket No. 99-295, FCC 99-404, ¶ 135 (rel. Dec. 22, 1999).

In Texas, by contrast, commercial usage has long been present on all but one of SWBT's electronic interfaces, and now is present on all the interfaces. Texas CLECs have sent nearly 1.2 million electronic service orders. *Habeeb Aff. Attach. E*. Accordingly, it was possible to test SWBT's systems, processes, and procedures in a real world, carrier-to-carrier setting. That is precisely what the Texas PUC did.

Telcordia, the firm conducting these tests, is completely independent from Southwestern Bell, was retained solely by the Texas PUC, and operated under their sole direction. Telcordia arrived at testing methodologies only after lengthy consultation with interested CLECs, and Texas PUC staff, which the Department of Justice monitored. The Texas PUC reviewed and approved the methodologies and processes used in the testing. After conducting those tests, Telcordia found, and the Texas PUC agreed, that SWBT's systems currently process CLEC transactions in a nondiscriminatory fashion, and can do so at reasonably foreseeable levels of demand. In all critical respects, the quality and comprehensive nature of these tests met or exceeded those conducted in New York. See SBC Br. at 27-31; Ham Reply Aff. ¶ 3.

DOJ Concern: The Telcordia Final Report does not clearly identify all major problems encountered during the test, assess the impact of these problems on CLECs, or investigate the root causes of these problems. Evaluation at 4.

The Department mischaracterizes Telcordia's reports. DOJ criticizes a single document – Telcordia's Final Report filed in September 1999. Telcordia's 172-page report and the accompanying hundreds of pages of appendices in fact summarize the test and the resolution of all major issues in great detail. The Report also is not a stand-alone document, as DOJ apparently believes. Rather, the Final Report must be read in conjunction with the Master Test Plan of July 1999, Telcordia's Interim Report of July 1999, and Telcordia's Supplemental Reports in October and December 1999. These documents detail the procedures to resolve various types of problems encountered during the test. In addition, Telcordia prepared a "Retest Plan" and worked with the CLEC test participants to define the scope of the retest. Implementation of these processes is documented in the appendices to the Final Report.

DOJ Concern: The carrier-to-carrier test in Texas was limited primarily to the system capabilities of the two main test participants, AT&T and MCI WorldCom. Evaluation at 4.

The carrier-to-carrier nature of the Texas OSS test is in fact one of its great strengths. The Commission's expressed preference is for evidence reflecting actual commercial conditions. See Michigan Order, 12 FCC Rcd 20543, 20618, ¶ 138 (1997). In Texas, the systems tested by Telcordia were the same systems now being used by major CLECs. These systems thus are subject to monthly performance reporting and ongoing scrutiny, and Telcordia's test is just a piece of SBC's evidence of nondiscriminatory performance. The Texas test showed that SWBT has actually assisted competitors in building commercially operational systems. The New York third-party test, by contrast, showed that Bell Atlantic could assist a vendor in building mock OSS systems. SWBT had no opportunity to provide the tester "better treatment [] than that of an ordinary carrier," as occurred in New York. New York Order ¶ 135.

While DOJ intimates that inclusion of additional carriers would have been desirable, the fact is that all CLECs were invited to participate. If only AT&T and MCI WorldCom "devoted the resources and time necessary to actively participate in the test of the EDI interface," Evaluation at 4 n.5, the other CLECs' failure to subject their EDI interfaces to testing cannot reasonably be counted as a reason for withholding interLATA authorization from Southwestern Bell. This is particularly so where SWBT's EDI interface is now in widespread commercial use. Ham Aff. ¶ 100.

DOJ Concern: Telcordia focused narrowly on SBC's computer systems and not on SBC's wholesale support systems generally. Evaluation at 4-5.

The Texas PUC, not Telcordia or SWBT, determined the scope of the Texas OSS test. The scope of the test was defined to focus specifically on issues not already resolved during the Collaborative Process. Thus, while Telcordia did not review "support systems" such as SWBT's Help Desk and account managers, these support systems were fully addressed and approved in the Collaborative Process – or the CLECs never raised them as an issue at all. See Ham Reply Aff. ¶¶ 30-39; Ham Aff. ¶ 264; see also, e.g., Final Staff Report at 161-212 (identifying issues regarding wholesale support for resolution in Collaborative Process).

Performance Monitoring

In consultation with CLECs and with federal regulators, the Texas PUC developed and approved a set of 131 performance measurement categories – along with 1874 separate submeasurements – that allow CLECs and regulators to confirm that SWBT is providing local facilities and services on a nondiscriminatory basis. This is far and away the most comprehensive performance reporting program in the industry. By way of comparison, this is about three times as many submeasurements as were reported in Bell Atlantic's FCC-approved plan for New York. SWBT's monthly performance reports – which are available to CLECs, the Texas PUC, and the FCC through an Internet website – address pre-ordering, ordering, provisioning, maintenance and repair, and billing of UNEs and resold services; interconnection and collocation; directory assistance and operator services; 911 services; interim and long-term number portability;

directory assistance database; access to poles, ducts, conduits, and rights of way; loading and testing of NXX codes; and fulfillment of Special Requests for new UNEs or interconnection arrangements.

At the direction of the Texas PUC, Telcordia conducted an independent, third-party test of SWBT's data collection methods and procedures. Telcordia confirmed that SWBT properly implemented the Texas PUC's business rules for each performance measure; validated the numerical results reported by SWBT (which showed a reliability rate of better than 99.9 percent); verified that SWBT is reporting its results in accordance with the Texas PUC's requirements; and made recommendations for improving SWBT's processes and procedures – recommendations that SWBT promptly implemented. SBC Br. at 16-17.

DOJ Concern: Telcordia reviewed only a subset of the performance measures on which SBC reports. Evaluation at 5.

The Department grossly understates the scope of Telcordia's review. At the direction of the Texas PUC, Telcordia conducted an independent, third-party test of SWBT's data collection methods and procedures. See Telcordia Final Report at 145-162; Dec. 16, 1999 Open Meeting Tr. at 43-47. Telcordia confirmed that SWBT properly implemented the Texas PUC's business rules for each performance measure ("PM"); validated the numerical results reported by SWBT for March through June 1999; verified that SWBT is reporting its results in accordance with the Texas PUC's requirements; and made recommendations for improving SWBT's processes and procedures. See Dysart Aff. ¶¶ 65-77. Telcordia found that out of 1617 performance reports, there was only one calculation error that affected the results. Id. ¶ 70. Telcordia's test included 425 test case scenarios. Ham Att. A at C01-1. The test case scenarios were chosen for the purpose of "evaluat[ing] the end-to-end functionality, used to establish parity." Id. at C03-1. The test case scenarios, therefore, evaluated every aspect of SWBT's performance. They did not, however, test every measurement, nor did Telcordia need to do so. Telcordia concluded that testing every measurement, notwithstanding overlaps, would involve needless duplication. Importantly, however, in cases where Telcordia was of the opinion that separate test scenarios were unnecessary, but CLECs disagreed, Telcordia often deferred to the CLECs and tested both scenarios. Id. at C03-3. For example, Telcordia was of the opinion that "for simple POTS, there is little difference in the ordering process between residential and business. However, once again, Telcordia gave the CLECs the benefit of the doubt and left both in the test case." Id.

Performance reporting also is subject to a variety of safeguards apart from Telcordia's review. Every month, the CLECs (who themselves possess performance information) are able to review SWBT's reports. This process recently resulted in a correction of SWBT's classification of data on DSL-capable loops, demonstrating that it provides an important guarantee of accuracy. SWBT's reports also are subject to ongoing review by the Texas PUC, which provides still another layer of assurance. No other information on SWBT's wholesale performance, and most particularly not the CLEC allegations on which the Department relies, is subject to similar layers of verification and review.

DOJ Concern: Telcordia did not examine whether the metrics as defined are meaningful. Evaluation at 6.

It is difficult even to comprehend DOJ's position on this issue. Telcordia did not establish the metrics, and it was not Telcordia's job to determine whether those metrics were meaningful. The Texas PUC, CLECs, SWBT, and the Department itself developed the measurement categories, with detailed Texas PUC-approved business rules for each. See *Dysart Aff.* ¶¶ 13-59 & Attach. A. Every one of the 66 performance measures proposed by the DOJ has been adopted in Texas. In addition, 65 more measures were added by the Texas PUC, in consultation with CLECs. The DOJ never criticized any of these additional measures; yet it certainly cannot be suggesting that its own proposed performance measures are not "meaningful," or that it needs Telcordia to tell it if they are meaningful or not. Telcordia was not asked to evaluate the success of this collaborative endeavor – and it is not clear how Telcordia possibly could have done so. Telcordia's role was to determine whether the measurements deemed "meaningful" by the regulators were correctly reported.

Among those who are responsible for ensuring "meaningful" metrics in Texas is the Texas PUC. It has concluded that SWBT's performance measures and performance payments "satisfy the criteria established by the FCC and the Department of Justice, and provide meaningful measures that fully capture performance, discourage anti-competitive conduct, and provide effective assurances against backsliding after 271 relief is granted." Texas PUC Evaluation at 104. The Department also participated in development of the Texas measures. As noted, DOJ reviewed a list of 66 defined performance measures in March 1998, and concluded that they "would be sufficient, if properly implemented, to satisfy the Department's need for performance measures for evaluating a Section 271 application filed in the not-too-distant future." *Dysart Aff. Attach. E.* These 66 measures now comprise roughly half of SWBT's current performance measurement roster in Texas. All 131 measures, moreover, are subject to review (and modification if necessary) at regular six-month intervals. *Dysart Aff.* ¶ 45.

DOJ Concern: Telcordia's review is too dated and limited to ensure the accuracy of current data. Evaluation at 6.

As noted above, Telcordia reviewed SWBT's reporting of the 1617 measurements in place as of mid-1999. SWBT provided performance reports on 1874 measurements as of the date of Southwestern Bell's Application, an increase of only about 15 percent. Telcordia's review, moreover, has since been supplemented by the Texas PUC's data review and carrier-to-carrier reconciliations on issues such as hot cut performance, which collectively confirm the accuracy of Southwestern Bell's data collection and reporting.

The Department also criticizes the Telcordia test on the grounds that Telcordia only tested a small subset of the total number of measures. Evaluation at 6 n. 7. As previously discussed, however, Telcordia's 425 test case scenarios evaluated every aspect of SWBT's performance. While it is true that Telcordia did not test every measurement, this was because Telcordia reasonably concluded that such overlapping was unnecessary. *Ham Att. A at C03-2.*

DOJ Concern: Telcordia identified concerns regarding manual handling of data, the integrity of data files, and the auditability of performance data. Evaluation at 6-7.

These concerns have been resolved. At its October 20, 1999 Open Meeting, the Texas PUC received a final status report from Telcordia, at which Telcordia provided the results of a follow-up examination conducted in the preceding weeks. Telcordia and the Texas PUC staff reported that SWBT had implemented or was implementing five additional Telcordia recommendations relating to data control and auditability, thus closing this issue. Dec. 16, 1999 Open Meeting Tr. at 43-47; see Dysart Aff. ¶¶ 71-72. Although DOJ notes one improvement (relating to archiving) that has not yet been completed, Evaluation at 7 n.8, SWBT provides the same level of protection by placing in an archive all reports for indefinite retention. Dysart Reply Aff. ¶ 10.

II. COMPETITION IN LOCAL MARKETS IN TEXAS

Local competition is flourishing in Texas. The Affidavit of John Habeeb (Attach. E) estimates that CLECs already serve more than 1.4 million local lines in SWBT's Texas service areas; the Texas PUC believes the number is approximately 1 million lines. Texas PUC Evaluation at 1. At least 48 CLECs are providing facilities-based local service. Well over one hundred carriers resell SWBT's local service. These competing carriers operate across the State; they have won customers in 299 of SWBT's 300 local calling areas. In the profitable business segment of the local market, the numbers are even more impressive. CLECs serve approximately 22 percent of all business lines in SWBT's service areas, generally by using their own network facilities. Their market share, moreover, is expanding rapidly: Since April 1998, CLECs have captured more than 4 of every 5 new business lines in SWBT's service areas. See Habeeb Aff. ¶ 40.

DOJ Concern: CLECs' DOJ-estimated market share of 8% is somewhat less than the level of CLEC penetration in New York. Evaluation at 9.

The Department's point is immaterial, and wrong. DOJ makes an effort to compare its own estimate of 8% CLEC penetration in Texas unfavorably to Bell Atlantic's self-provided estimate that CLECs served 8.9% of lines in New York. The significance of this supposed difference – 8% vs. 8.9% – is a mystery. The Texas PUC observed that while the precise number of local lines served by CLECs “is difficult to confirm,” it is clear “that CLECs are providing service at significant levels to residential and business customers through resale, through their own facilities, or through the purchase of unbundled network elements from SWBT.” Texas PUC Evaluation at 9, 103. In any event, DOJ's comparison is flawed. Southwestern Bell provides the same number of interconnection trunks to CLECs in Texas as Bell Atlantic provides to CLECs in New York. Compare Habeeb Aff. Attach. E (347,830 trunks) with Bell Atlantic's Taylor Decl. Attach. A, Table 2, New York Application, CC Docket No. 99-295 (FCC filed Sept. 29, 1999) (348,765 trunks). There are more resold lines in Texas than in New York. Compare Habeeb Aff. Attach. E (322,151 resold lines) with Bell Atlantic's Taylor Decl. Attach. A, Table 2 (314,332 resold lines). Thus, using DOJ's methodology based on interconnection trunks and resold lines, see Evaluation at 9 n.15, there are at least as many

CLEC lines in Texas as there are in New York. Since Bell Atlantic serves about 20% more lines in New York, CLEC penetration must be higher in Texas than in New York.

DOJ Concern: SBC appears to have substantially over-estimated the number of lines served by facilities-based carriers. Evaluation at 8-9.

Again, the Department's claim would be immaterial, even if it were correct (which it is not). Although the Department seems unwilling actually to say so, it evidently accepts that Southwestern Bell has satisfied the requirements of Track A. The Department likewise does not dispute the Commission's holdings that there is no "metric" test for section 271 relief. See New York Order ¶ 427. The Department additionally agrees that Southwestern Bell's suggested methodology of using the number of CLEC interconnection trunks to estimate the number of CLEC facilities-based lines is appropriate. Evaluation at 9 n.15. However, the Department proposes that the number of lines served by CLECs should be deemed the same as the number of trunks used by CLECs. Id. The Texas PUC has determined that SWBT's assumption of 2.75 lines per trunk is "reasonable." Texas PUC Evaluation at 102. By contrast, DOJ's unsupported one-to-one ratio is grossly improbable. It does not fit SWBT's information about CLEC trunk usage, the CLECs' own statements that they serve much more than 2.75 lines per trunk, or the market facts in Texas. See Habeeb Reply Aff. ¶¶ 7-10.

III. SBC'S PROVISION OF NON DISCRIMINATORY ACCESS TO DSL LOOPS

SBC and the Texas PUC have both taken every reasonable step to ensure CLECs the same nondiscriminatory access to xDSL-capable loops as they have to other types of unbundled loops. Anticipating CLEC demand for xDSL loops, the Texas PUC included them in the Telcordia-supervised OSS test, which Southwestern Bell passed in all respects. See Reply Br. at 14. In response to the Department's comments on Bell Atlantic's section 271 application, the Texas Commission convened a special proceeding to address DSL issues, which resulted in a number of changes to SWBT's procedures as well as new performance measurements that specifically address this new offering. Id. at 16. When Bell Atlantic committed, on the eve of the FCC's decision on the New York section 271 application, to follow the same separate affiliate rules already accepted by SBC, SBC accelerated deployment of its own separate affiliate's services in Texas. Id. at 34-37. In addition to this separate subsidiary, SBC has provided performance data showing consistent satisfaction of the Texas PUC's benchmarks and performance standards in four of the five relevant performance categories identified by the New York Order (quality of DSL loops provisioned, timeliness of maintenance and repair, quality of maintenance and repair, and access to pre-ordering and ordering OSS functions). As explained below, performance differences in the fifth category (installation intervals) are attributable to basic provisioning differences that will disappear when line sharing is implemented in accordance with FCC orders. The Department concerned itself almost entirely with a small corner of this large picture of diligent regulation and diligent compliance – specifically, SWBT's performance data – and the Department misstates the facts even as to that.

Performance Data

DOJ Concern: SBC's DSL Performance Data Are Unreliable. Evaluation at 12.

The Department's very serious allegation of unreliable data is wildly disproportionate to its proof. DOJ urges the Commission to reject SWBT's DSL-related performance data in their entirety, as being "seriously flawed." Evaluation at 12. This suggestion goes to the heart of the Commission's position that state-supervised performance reporting is the most appropriate starting point for assessing checklist compliance, and may itself be dispositive. New York Order ¶¶ 56-60. The Department is also making a frontal assault on the Texas PUC's finding – based on nearly two years of direct experience with SWBT's reporting and a specific investigation of DSL-related data – that SWBT's performance reporting is reliable and that sufficient steps have been taken to "ensure accurate reporting" in connection with these new services. Texas PUC Evaluation at 63, 109, 111. As explained below, however, the Department's entire case is based upon a small number of "inevitable start-up problems" (Second Louisiana Order, 13 FCC Rcd 20599, 20654, ¶ 78 (1998)) that caused SWBT to understate aspects of its wholesale performance. By correcting these problems, SWBT in fact demonstrated the sufficiency of safeguards already built into the Texas PUC's reporting program.

DOJ Concern: In reporting on Performance Measure ("PM") 57 (interval for returning loop make-up information), SBC understated the time it takes to respond to CLEC requests for loop qualification information by excluding both the period of time the request was with SBC before the SBC representative started working on it and the period of time the response remained with SBC after the representative's work was completed. Evaluation at 12-13.

SBC has followed the rules in Texas, and shown parity performance even under the Department's preferred methodology. SBC implemented PM 57 in January 1999 in accordance with the provisions of its Performance Measurement Data Collection Flows Mid Level Document, which described how calculations would be made and was reviewed by the Texas PUC and CLECs during the collaborative process. See Application App. C, Tab 1815, Attach. A at 41 (Tex. PUC filed Sept. 29, 1999) ("Currently data on all orders is being collected manually and time stamped at the time the request is sent to [the Outside Plant Engineering Group] and the time it is returned."). SBC was in parity from September through December 1999 under this calculation. In December 1999, as a result of collaboration between the Texas PUC, SBC, and CLECs, SBC agreed to calculate results for PM 57 as recommended by the DOJ. See Texas PUC Evaluation at 64. SBC was in parity in January 2000 using this revised calculation. See Dysart Reply Aff. ¶ 38.

DOJ Concern: SBC failed to disaggregate PM 5 (Percent Firm Order Confirmations (FOCs) Received Within “X” Hours) and PM 6 (Average Time to Return FOC (Hours)) to provide FOC data for DSL loop orders. The actual experience of the CLECs suggests that delays in receiving FOCs for DSL orders impair their ability to compete. Evaluation at 13-14.

SBC has reported its FOC performance in accordance with guidelines approved by the Department itself. The CLECs’ allegations of delays in returning FOCs are not supported by SWBT’s CLEC-specific data, and nothing in the CLECs’ complaints shows that they have suffered competitive harm from any delays that did occur.

On March 6, 1998, the DOJ approved a set of performance measurements which “would be sufficient, if properly implemented, to satisfy the Department’s need for performance measures for evaluating a Section 271 application filed in the not-too-distant future.” Dysart Aff., Attach. E. The Final Version of the performance measurements approved by the DOJ do not require measurement of the return of a FOC on a DSL loop order. Dysart Reply Aff. ¶ 41. DOJ also participated in the Texas collaborative process through which the business rules for the current PMs 5 and 6 were developed, without ever suggesting there should be a measurement for FOCs on DSL loop orders. The Department can hardly recommend denial of SBC’s Application based on performance measurements DOJ itself endorsed. SBC has, nevertheless, addressed this concern of DOJ by agreeing to report its performance in providing FOCs on DSL loop orders beginning with February 2000 data. *Id.* ¶ 41. As for CLEC allegations of delays in returning FOCs, data for one CLEC (Covad) show that it misstated FOC return times by more than 100 percent. Reply Br. at 32-33.

DOJ Concern: SBC’s reported performance on PM 62 (Average Delay Days for SWBT Caused Missed Due Dates) for September through December 1999 indicated that the average number of delay days was 0, but SBC later provided corrected data showing a significant disparity between average delays for CLECs and average delays for SBC’s retail operations in November and December. Evaluation at 14-15.

SBC’s correction of a reporting error shows that the safeguards built into the Texas PUC’s performance monitoring program work; this correction certainly does not show that SBC’s data must be ignored, as DOJ asserts. The reporting error of which DOJ complains was caused when incorrect data were placed in a single cell on an Excel spreadsheet. Dysart Reply Aff. ¶ 29. This cell was one out of 50 million cells of information in SWBT’s performance data. The incorrect insertion was a one-time error – once cells are established, it is not necessary to edit them when generating monthly reports. *Id.* The resulting reporting error was brought to SBC’s attention by the Commission staff, which (like the Texas PUC and the Department) has routine access to SBC’s monthly performance results. SBC promptly corrected its report and the record in this Texas 271 proceeding. The fact that there was a very isolated reporting problem, which was detected and immediately corrected, thus does nothing to undermine Telcordia’s conclusion that SBC’s performance data collection and reporting procedures are reliable. *See* Dysart Aff. ¶¶ 75-81.

DOJ Concern: The data submitted with SBC's Application for PM 55.1 (Average Installation Interval – DSL) failed to reflect data for a majority of the DSL loops provisioned by SBC. SBC has not yet issued corrected reports for individual CLECs, which are necessary for them to reconcile disputed data with SBC. Evaluation at 15-16.

This is another case where the Department attempts to turn a strength of SBC's performance reports – here, their exposure to full CLEC review – into a vice. The reporting error identified by the Department was readily identified by NorthPoint and plainly was inadvertent: DOJ acknowledges that the corrected data show better performance by SBC than the original data did. Evaluation at 16. (In fact, the corrected data demonstrate that for September through December 1999, SBC was in parity in all 3 months for which data are available with respect to average installation intervals where conditioning is not required, and in parity during 2 out of 4 months where conditioning is required.) The error resulted from addition of a new service code for DSL in October 1999; orders for xDSL-capable loops were incorrectly coded as orders for resold DSL service. SBC has provided NorthPoint with corrected PM 55.1 data, and all CLECs received corrected data via SBC's Internet website on February 21, 1999. Dysart Reply Aff. ¶¶ 17-22.

DOJ Concern: Covad claims that SBC is improperly excluding almost half of its orders from PM 55.1. Evaluation at 16.

Covad, and thus the Department, are mistaken. The rules for calculating PM 55.1 specifically call for exclusion of customer-requested due dates outside the offered installation interval. Dysart Aff. Attach A. In November, Covad requested due dates outside the interval for 37% of orders without conditioning, and for 33% with conditioning. In December, Covad requested due dates outside the interval for 58% of orders without conditioning, and for 16% with conditioning. Dysart Reply Aff. ¶ 23. Covad's count also ignores SWBT's reporting of BRI-ISDN loops, which cover one-third of the circuits ordered by Covad. See Dysart Reply Aff. ¶ 22.

DOJ Concern: There are disputes over whether SBC has actually installed a working loop at the point in time when it claims to have done so, which could be remedied by joint acceptance testing of loop installations. According to Rhythms, SBC had until recently refused to engage in acceptance testing for DSL loops, although ordered by the Texas PUC to do so. Evaluation at 16-17.

DOJ has its facts wrong. The Lopez/Baros Affidavit in Rhythms' comments did not claim that the Texas PUC ordered SBC to do acceptance testing; SWBT in fact voluntarily offered to include acceptance testing in its interconnection agreements with the CLECs. Chapman Reply Aff. ¶ 10. Rhythms, however, did not ask for acceptance testing when their interconnection agreement was being negotiated. Id. ¶ 11.

DOJ Concern: Performance reports demonstrate that SBC is failing to provide nondiscriminatory performance in provisioning DSL loops. Evaluation at 18-21.

Consistent with its chosen position as an advocate, rather than an objective expert in this proceeding, DOJ criticizes SBC's performance in provisioning xDSL-capable loops by relying upon only a few months of data for a carefully selected subset of performance measurements. Indeed, the Department examines SBC's performance in just 6 out of 13 DSL-related performance measurements. When viewed in light of the market facts in Texas and SBC's full record of performance – with which the Texas PUC is intimately familiar – the Department's conclusions are untenable for each of five categories of performance reporting suggested by the Commission. See New York Order ¶ 335.

Category 1 -- Measurements demonstrating provision of DSL loops for CLECs within substantially the same average interval as SBC's retail operations, or in an interval that offers CLECs a meaningful opportunity to compete.

DOJ looks at only one month of data for this category of measurements. DOJ admits that for December, there was no statistically significant difference between the average installation intervals for conditioned loops experienced by SBC retail and by CLECs (PM 55.1). Evaluation at 20. DOJ fails to note that SBC has two performance measurements in this category – PM 55.1-1 (Average Installation Interval – No Conditioning) and PM 55.1-2 (Average Installation Interval – Conditioning). For PM 55.1-1, SBC was in parity during all 3 months for which data are available. For PM 55.1-2, SBC was in parity during 2 out of 4 months, including December. DOJ therefore falls back to its allegation regarding supposed exclusion of data from PM 55.1, *id.*, which SBC has rebutted above.

Category 2 -- PMs demonstrating that SWBT meets substantially the same number of installation appointments for CLECs as its retail operations, or that the level of missed appointments is sufficiently low to offer competitors a meaningful opportunity to compete.

This is one of those areas where it is necessary to “examine the evidence further to make a determination whether the statutory nondiscrimination requirements are met.” New York Order ¶ 59. This is particularly the case given that DOJ offers just 3 of the 7 measurements in this category as evidence that SWBT is not providing nondiscriminatory performance. DOJ points to PM 58 (Percent SWBT Caused Missed Due Dates), PM 60 (Percent Missed Due Dates Due To Lack of Facilities [>30 days]), and PM 62 (Average Delay Days for SWBT Missed Due Dates). In so doing, the Department ignores other measurements in this same category that demonstrate parity.

DOJ is correct that the results for PM 58-09 suggest on their face that SWBT is not providing parity performance. Root cause analysis of these results reveals that lack of facilities – i.e., UNE loops – is the most frequent single cause of missed due dates in provisioning DSL loops for CLECs. Dysart Reply Aff. ¶ 27-28. This is further demonstrated by PM 60-08, which measures “% Missed Due Dates Due To Lack Of Facilities,” and shows out-of-parity results in 3 out of 4 months.

Digging deeper, the issue of loop availability arises because PMs 58-09 and 60-08 compare missed due dates in provisioning xDSL-capable unbundled loops for CLECs with missed due dates in provisioning SBC's retail ADSL service. This is a skewed comparison. See Dysart Reply Aff. ¶¶ 26-31. When SBC provides ADSL service, it is also providing voice services to the end user customer, and hence is "line sharing." With "line sharing," it is not necessary for SBC to obtain a separate UNE loop for ADSL. SBC connects the DSLAM functionality to the same loop over which it is providing voice services to the customer. Data CLECs, on the other hand, have made the business decision not to provide voice services. Therefore, until "line sharing" is available, they order a separate UNE loop to provide their data services. If a UNE loop is not available, SBC will miss the installation due date – a situation that rarely arises on the retail side because of line sharing with existing voice service. With implementation of the FCC's Line Sharing Order, CLECs will not need a separate UNE loop with every order, which should eliminate the bias built into PMs 58-09 and 60-08.

In fact, when misses due to lack of facilities are removed from the calculation of PM 58, the level of missed due dates drops to 5% for CLECs and is in parity for December. Dysart Reply Aff. ¶ 31. The differences in prior months are somewhat higher, but sufficiently low to offer CLECs a meaningful opportunity to compete. See Dysart Aff. ¶¶ 345-360. This is particularly so given that the FCC, in its review of the SBC/Ameritech merger, recognized the inherent difference between line sharing and CLECs' use of unbundled loops for data services, and provided the CLECs a 50% discount off the monthly recurring charge for a UNE loop used to provide advanced services compatible with line sharing (such as ADSL) to customers of SBC's voice-grade service. See SBC Br. at 44-45.

DOJ confuses PM 60-08 (Percent Missed Due Dates Due To Lack of Facilities) with PM 60-21 (Percent Missed Due Dates Due To Lack of Facilities >30 Days). DOJ wrongly asserts that SBC is out of parity on PM 60-21, even though the data actually show that SBC was in parity during the 2 months with available data. Evaluation at 19. The data cited by DOJ are really data reported on PM 60-08, which is discussed above.

SBC was out-of-parity on PM 62-09 (Average Delay Days For SWBT Missed Due Dates), which again reflects that lack of an available loop takes a relatively long time to resolve. See Dysart Reply Aff. ¶¶ 27-28. The Department, moreover, chooses to ignore all the other measurements in this category that show SBC to be in parity. SBC was in parity during the 2 months for which results on PM 60-34 (Percent Missed Due Days Due To Lack Of Facilities > 90 days) and PM 61-08 (Average Delay Days Due To Lack Of Facilities) were available. Finally, SBC was in parity in 2 out of 4 months, including December, on PM 63-09 (Percent SWBT Caused Missed Due Dates > 30 days).

Category 3 -- PMs demonstrating that SWBT provisions loops to CLECs of a quality that is substantially the same as that provided to its retail operations, or at a level sufficiently high to permit CLECs to meaningfully compete.

The Department cites SBC's performance on PM 59 as support for its contention that SBC is discriminating. Evaluation at 20. PM 59-08 (Percent Trouble Reports Within 30 Days) in fact demonstrates that SWBT is provisioning loops of equal quality. It measures, for both SBC and CLECs, the percentage of DSL loops upon which the customer reports trouble within

30 days of service order completion. DOJ cited only on December results, which were not in parity, yet the results for PM 59-08 show that SWBT was in parity during 3 out of 4 months. When fairly read, this measurement certainly does not “clearly indicate discrimination,” as the Department says. Evaluation at 18.

Category 4 – PMs demonstrating that SWBT performs maintenance and repair for CLEC DSL loops in substantially the same time and manner as its retail lines.

Performance results for this category unequivocally show parity service for CLECs. Being highly selective, the Department cites SWBT’s performance on PM 65-08 (“Trouble Report Rate [For DSL Loops]”) in December as evidence of discrimination. Evaluation at 20-21. PM 65-08 (“Trouble Report Rate”) is a maintenance and repair measurement, since it measures the total number of trouble reports made within a calendar month. What the Department fails to say in its Evaluation is that SWBT was in parity in 3 out of 4 months for this measurement, with December being the only exception.

Moreover, DOJ ignores SBC’s performance on PM 67-08 (“Mean Time To Restore – Dispatch”) and PM 69-08 (“Percent Repeat Reports”). PM 67-08 measures the average time it takes to clear a trouble report, and PM 69-08 measures the percentage of trouble reports received within 30 calendar days after a previous trouble report. These measurements indicate how quickly SBC clears trouble on the line and whether the repair is properly made. SBC was in parity on both PM 67-08 and PM 69-08 in the 2 months for which data are available.

Category 5 – PMs demonstrating that SWBT provides non-discriminatory access to pre-ordering and ordering functions associated with the provision of DSL loops, including access to loop qualification information and databases.

PM 57-01 (“Average Response Time for Loop Make-Up Information”) demonstrates SBC’s performance in providing non-discriminatory access to loop make-up information. SWBT was in parity all 4 months on PM 57-01. DOJ’s concerns about the method of calculation of this measurement and SBC’s response – that the measurement has been appropriately calculated at all times and is now calculated as DOJ suggests – are given above.

DOJ Concern: SBC’s performance reports demonstrate substantial discrimination and a clear trend of declining performance as volumes have increased for ISDN BRI loops. Evaluation at 21-23.

SBC’s numerical performance has suffered from SWBT’s attempts to accommodate CLEC customers. The type of ISDL service CLECs are deploying over ISDN BRI loops is not always compatible with the standard ISDN BRI loop. Accordingly, SBC commonly works with CLECs on a case-by-case basis, prior to completion of the order, in an effort to provide a customized loop that meets the CLEC’s needs. This effort has led to declines in SWBT’s installation timeliness and trouble report results. See Chapman Reply Aff. ¶¶ 18-19. Efforts to provide CLECs the best possible service cannot rightly be considered evidence of discrimination.

Separate Advanced Services Affiliate

DOJ Concern: SBC provides virtually no information about the relationship that will exist between the BOC and its affiliate to ensure that the affiliate's relationship to the BOC is the same in all relevant respects as the relationship between CLECs and the BOC.

Evaluation at 25.

The details of the relationship between SBC's separate advanced services affiliates and SBC's incumbent LECs are set out in great detail in the SBC/Ameritech merger conditions, which specifically incorporate terms of the FCC's orders implementing section 272.

Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control, 14 FCC Rcd 14712, 14969, App. C, Part I (1999). These are precisely the same requirements that Bell Atlantic agreed to abide by during the course of consideration of its section 271 application for New York. See New York Order ¶ 331 n.1036. Unlike Bell Atlantic, SBC has actually been implementing the requirements of the SBC/Ameritech merger conditions for more than four months. See Brown Aff ¶ 5.

DOJ Concern: SBC's performance data with respect to DSL services have serious flaws, and therefore cannot be relied upon as an effective mechanism to detect discrimination. SBC has not made a concrete demonstration that its separate affiliate structure has resulted in nondiscrimination. **Evaluation at 25-26.**

The Department suggests that SBC should be required to prove what the Commission already has found. The Commission explained in its New York Order that providing advanced services through a separate affiliate would "reduce the ability of the BOC to discriminate against competing carriers"; "ensure a level playing field between the BOC and its advanced services competitors"; and encourage entry into the provision of advanced services. New York Order ¶ 332. The Commission made crystal clear that establishing a structurally separate advanced services affiliate is an alternative to "establishing by a preponderance of the evidence that it provides xDSL-capable loops to competitors in a nondiscriminatory manner." Id. ¶ 333. DOJ's attempt to double-count its (mistaken) concerns about SWBT's DSL performance data as part of its discussion of the separate affiliate simply disregards the Commission's rationale for establishing two alternative avenues of satisfying this aspect of Checklist Item (iv).

DOJ Concern: SBC's separate advanced services affiliate in Texas, ASI, is not yet fully operational. **Evaluation at 26.**

ASI was incorporated to be an SBC advanced services affiliate on July 27, 1999 – five months before Bell Atlantic agreed to provide advanced services through an affiliate. As of February 28, 2000, ASI will place orders for unbundled local loops using the same systems, processes, and procedures as CLECs use. See Brown Aff. ¶ 5 & Attach. A. This accelerates the schedule set out in the SBC/Ameritech merger conditions by more than a month.

IV. SBC'S WHOLESALE PERFORMANCE IN PROVIDING UNBUNDLED LOCAL LOOPS

Hot Cuts

The Commission considers three facets of hot-cut provisioning: timeliness, service outages, and quality (as reflected in trouble reports). New York Order ¶¶ 291-309. Applying the Texas PUC's standard of 2 hours for orders of up to 24 loops, SWBT's on-time performance has consistently exceeded 95%. This is dramatically better than Bell Atlantic's 90% on-time performance. SWBT's data on service outages and trouble reports show comparable performance to Bell Atlantic, in its successful section 271 application.

DOJ Concern: In New York, Bell Atlantic completed 90% of hot cut orders within the benchmark time, including orders for fewer than ten loops within one hour. The only directly comparable data provided by SBC show that from August through October 1999, 85.6% of coordinated hot-cut ("CHC") orders were completed within one hour, and in December 1999, 86.3% were completed within one hour. Evaluation at 30-32.

The Department badly mischaracterizes the Commission's analysis in the New York Order. The New York Order did not establish a national, one-hour benchmark for hot-cut completion. (That was not even the benchmark in New York, where on-time performance was measured against "a fixed period of time ranging from one hour to eight hours.") The Commission instead measured on-time performance against "the [State] Commission's adopted standard" or, alternatively, a standard of meeting the state commission's benchmark of 90% of the time. New York Order ¶¶ 292-298.¹

In Texas, there was no benchmark interval prior to December 1999, when the Texas PUC adopted a two hour interval in connection with PM 114.1. See Texas PUC Evaluation at 57 (Tex. PUC filed Dec. 14, 1999). (The Department's only contrary evidence about the Texas PUC's standard is the say-so of an AT&T affiant, who offers no supporting citation. See Evaluation at 31 n.84.) Applying the Texas PUC's "adopted standard" of two hours for orders of up to 24 loops – and using the same data on which the Department relies – SWBT completed 264 of 270 CHC hot-cut orders within 2 hours between August and October 1999. Dysart Aff. ¶ 655. This 97.4% on-time performance is dramatically better than Bell Atlantic's 90% on-time performance. In December 1999 (the next month for which data are available), SWBT completed 95.3% of all CHC orders on time. Jan. 21, 2000 Hot Cuts Ex Parte. The Department thus is flatly wrong about this measure. SWBT's on-time completion performance in fact gives SWBT a healthy advantage in any head-to-head comparison with Bell Atlantic's hot-cut performance.

¹ Even if the Department were right, and SWBT were tested against a one-hour interval for all hot-cut orders regardless of size, SWBT's on-time performance would still be above 90 percent; SWBT completed 90.7 percent of all hot cuts within one hour in December. Dysart Reply Aff. ¶ 32.

DOJ Concern: In New York, fewer than 5 percent of Bell Atlantic's hot cuts resulted in service outages. In Texas, a joint SBC/AT&T analysis of CHC data determined that service outages attributable to SBC performance occurred on 8.2 percent of AT&T's CHC orders. Evaluation at 32-33.

The Department chooses its evidence far too selectively. The outages attributed to SWBT during the AT&T data reconciliation amounted to 4.3% of total lines cut-over, which is better than the New York Order's 5% threshold. Indeed, a December reconciliation with AT&T similarly showed that only 1.6% of loops with number portability experienced SWBT-caused outages. Conway Reply Aff. ¶ 13. Without explanation, however, DOJ looks only at the percentage of orders with an outage on even one line. This measure can greatly overstate the practical significance of an outage on, say, 1 out of 20 business lines. But even under this measure, SWBT-caused outages were below 5.1% in two of the four months for which reconciled data are available, and never higher than 11%. Id. ¶ 13. Thus, under any view of the data jointly assembled by AT&T and SWBT, SWBT's outage performance is not substantially different than Bell Atlantic's.

DOJ Concern: In New York, the Commission found that fewer than two percent of hot cuts generated trouble reports within seven days. The data that are available suggest that SBC's performance is no better, and may be slightly worse, than Bell Atlantic's performance in New York. Evaluation at 33.

The Department does not dispute that SWBT's performance is approximately the same as Bell Atlantic's. SWBT has provided data for Installation Reports within ten days (I-10) for December 1999, which more closely approximates the I-7 reports available in New York. These I-10 reports show a trouble rate of 2.2 percent for coordinated conversions. Jan. 21, 1999 Hot Cuts Ex Parte. Bell Atlantic reported just slightly fewer trouble reports in its successful New York application, but Bell Atlantic measured the trouble reports received within only the first 7 days after installation, rather than 10 days. New York Order ¶ 300 n.956. Even DOJ does not suggest that there is any competitively significant difference here.

DOJ Concern: SWBT has provided very little evidence of its performance in providing hot cuts through the frame due time ("FDT") process. Evaluation at 34-36.

SBC has provided all available data for this relatively new offering. Originally, SWBT converted its loops to CLEC service using only the coordinated conversion process. SWBT recently introduced the FDT process as a more efficient method of accomplishing conversions based on a pre-set start time. See Conway Aff. ¶ 79. Because they predate the FDT process, the Texas PUC's performance measures historically have tracked only CHCs, which continued to be far more prevalent through November 1999. See Id. As of its data for February 2000, SWBT will disaggregate all hot-cut performance measures by CHC and FDT cut-overs. See Jan. 21, 2000 Hot Cuts Ex Parte. SWBT has provided data that already are available on the FDT process. The data show that in December 1999, SWBT did its work on FDT hot cuts within two hours 96.8% of the time. 93.8% of the loops cut-over in December using FDT were completed within one hour. January 21, 2000 Hot Cuts Ex Parte. Trouble reports were made within 10 days about 2.9% of the time – approximately the same as for Bell Atlantic as discussed above.

DOJ Concern: AT&T's trials showed significant problems with outages due to the SBC technician not starting the cut at the scheduled time. Other commenters report similar experiences with the FDT process. Evaluation at 34-35.

During the joint reconciliation effort, two issues were identified as contributing to the FDT outages, both of which have been resolved. These include inadequate training of SWBT employees in one central office in the Houston Market Area, and misidentification of five FDT requests as CHC requests. Conway Reply Aff. ¶ 14. SWBT has addressed both of these issues by thoroughly training its employees; the training is complete and the problem resolved. *Id.* In addition, it should be noted that the misidentification of FDT requests as CHC requests was in large part due to the fact that AT&T had verbally communicated its discontinuation of FDT cut-overs prior to submitting the FDT orders. This caused SWBT employees to treat the FDT requests as if they were CHC requests. *Id.* In any event, the FDT outages were caused by errors that were easily rectified through thorough training of SWBT employees. *Id.*

UNE-Loop Order Processing

SWBT has provisioned more than 166,000 unbundled local loops and UNE platforms, each of which represents at least one customer line served by a CLEC on a facilities basis. Habeeb Aff. Attach. E. The process of ordering and provisioning these loops has been repeatedly and carefully tested. SWBT's performance has been exceptional, consistently meeting or exceeding established benchmarks.

DOJ Concern: Performance for Firm Order Confirmations ("FOCs") returned via EDI fell below the benchmark in October 1999 and performance was even worse in November and December 1999, with only 85.8 percent returned within five hours. Evaluation at 38.

SWBT provides outstanding performance in returning a FOC within five hours on electronically submitted service requests. For example, in November and December 1999, for residence and simple business orders submitted via EDI, SWBT returned a FOC within five hours on 99.8% and 97.4% of the applicable orders, respectively. *See* Ham Reply Aff. ¶ 108; Feb. 9, 2000 Ex Parte, PM 5.07. As DOJ acknowledges, SWBT's FOC-return performance for UNE loops consistently met the benchmark between May 1999 and September 1999. *See* Feb. 1, 2000 Ex Parte. Although performance was not at the 95% benchmark level between October and December, problems are not "increasing," as DOJ claims. Evaluation at 38. Far from getting worse in November, performance improved from 88.1% on time to 92.7% on time, as measured by PM 5. As the Department notes, on-time performance was about 86% in December. *Id.* at 38 n.105. Particularly when viewed in light of SWBT's 95% to 99% on-time performance prior to October, this 86% to 93% performance is well within the range deemed by this Commission to give CLECs a meaningful opportunity to compete. *See New York Order* ¶ 167 (average order confirmation return time of five to eight hours is nondiscriminatory). The Texas PUC specifically addressed concerns about SWBT's capacity, noting: "The largest volume of orders occurred in August and the performance in that month was well above the benchmark. Thus the Texas Commission does not believe that a systematic problem exists." Texas PUC Evaluation at 39.

DOJ Concern: FOCs returned via LEX have been chronically late. Evaluation at 38-39.

Any suggestion that CLECs are suffering a significant competitive disadvantage, or that there is a pattern of deteriorating performance, is rebutted by the Department's own footnote on this issue: "SBC's performance for FOC returns via LEX has bounced around from 94% timely to 90% timely and back to 97% timely; average time has also varied from .9 hours to 2.1 hours." Evaluation at 39 n.106. In fact, on-time performance for mechanized FOC returns via LEX (PM 5) have shown a steady pattern of improvement since August 1999, and satisfied the 95% benchmark in May, June, and July as well.

DOJ Concern: For manually submitted orders, SBC's performance in returning timely confirmations declined from September through November 1999. In December, SBC reported improvement in the percentage of orders returned on time, though the average time for these returns rose precipitously. Evaluation at 39-40.

SWBT's on-time performance for manual FOC returns on UNE loop orders of up to 50 loops has been in parity during 7 of 12 months in 1999. Performance has been below 91% in only two of these months, and below 88% in only one month. The Department recognizes that SWBT has explained the reasons why SWBT's performance was below the Texas PUC's benchmark in some months. See Evaluation at 39-40. The key point, however, is that CLECs have not suffered a diminished ability to compete as a result of these relatively minor shortfalls.

DOJ Concern: SBC's time to manually process rejects on electronically submitted orders has been significantly increasing. Evaluation at 40.

SWBT has forthrightly acknowledged the need for improvements in its processes to speed manual handling of electronically submitted loop orders. Many such improvements have been made. See Conway Aff. ¶¶ 96-99; Dysart Aff. ¶ 133; Conway Reply Aff. ¶¶ 3-16. And, despite the Department's claim that "fewer and fewer of these rejects are being returned within the benchmark interval of five hours," Evaluation at 40, performance results have in fact steadily improved since October. Bell Atlantic's average time to return manually processed rejection notices for combined and stand-alone UNE loop orders of less than 10 lines was 31.1 hours in June 1999, 24.3 hours in July, 17.4 hours in August, and 14.24 hours in September – significantly higher than the times reported in SWBT PM 11.1. See Evaluation at 40 n.111; see also DOJ New York Evaluation Exh. 5 at 2, New York Application, CC Docket No. 99-295 (FCC Filed Nov. 1, 1999); Dowell/Canny Aff. Attach. D at 78, 90, and 102, New York Application, CC Docket 99-295 (FCC Filed Sept. 29, 1999); Dowell/Canny Reply Aff. Attach. C at 7, New York Application, CC Docket 99-295 (FCC Filed Nov. 8, 1999). Finally, the time intervals recorded under PM 11.1 are inflated by the fact that the time necessary for qualification of an xDSL-capable loop (up to three days) is included in the measure; this loop-qualification work by SWBT's engineering force is done on a nondiscriminatory basis and is not an order-processing function of the sort the Department intends to address. See Chapman Aff. ¶ 41; Chapman Reply Aff. ¶ 41.

DOJ Concern: SBC has been running late on Service Order Completions (“SOCs”) for UNE-loop via LEX from May through December 1999. Evaluation at 41.

The Department buries in a footnote that “SBC reports that SOC’s returned via [the industry-standard] EDI have been timely, in accordance with the Texas PUC’s 24-hour benchmark.” Evaluation at 41 n.114. And the Department entirely fails to note that, as reflected in data for PM 7.1, order volumes for EDI exceeded volumes for LEX in December 1999 by nearly 75%. The Department’s attempt to hide SWBT’s outstanding performance (i.e., better than 96% on-time performance in every month from August through December) on the primary interface for UNE ordering, is remarkable. It calls into question whether the Department is fulfilling its role of “expert witness,” New York Order ¶ 51, or acting simply as another advocate. In any event, SWBT has undertaken extensive internal process improvements to address its performance with respect to PM 7.1. Conway Reply Aff. ¶ 29. The result has been a steady improvement in performance.

DOJ Concern: UNE-loop CLECs must deal with the apparent manifestations of late posting of their orders to SBC’s billing systems, including double billing of end-users and loss of directory listings. Evaluation at 41-42.

Here, the Department manifestly errs in giving greater weight to vague CLEC allegations, than to hard performance data and the investigations of the Texas Commission.

Double Billing. Unlike the Department, CLECs carefully couch their assertions in terms of facing “a risk” of double billing, as opposed to competitively important problems. E.g., AT&T Comments at 41 & DeYoung Decl. ¶ 18. A number of CLECs have complained of problems with double billing. AT&T Comments at 67-68; AT&T’s DeYoung Decl. ¶¶ 193-195; MCI WorldCom Comments at 11-14; NEXTLINK’s Smith Aff. ¶ 5 (attached CLEC Coalition Comments). These CLECs discuss this issue almost exclusively in terms of there being a “risk” of double billing; they do not present any evidence of widespread, endemic problems. And the Department, in another section of its Evaluation, concedes that “we lack sufficient information to know whether the order processing problems here are currently a major factor.” Evaluation at 43. Double billing was one of the 129 issues originally designated by the Texas Commission to be resolved during the Collaborative Process. And it was resolved. As described in the November 1998 Final Staff Status Report on the Collaborative Process (Application App. C, Tab 1233), SWBT undertook a number of steps to minimize the likelihood of double billing. Telcordia reviewed these new processes as part of its OSS functionality test and “did not uncover any major issues.” Final Report § 4.5.4.5. The actual number of problems is vanishingly small. In November and December 1999 AT&T and TCG requested that SWBT investigate 42 of their Texas UNE accounts for supposed double billing. The investigation revealed that SWBT had issued the appropriate credit with the final bill for each of this handful of disputed accounts. This data reconciliation is described in the December 14, 1999 Affidavit of Elizabeth Ham, filed with the Texas PUC (App. C, Tab 2004). What AT&T paints as double billing by SWBT is, in nearly all cases, SWBT’s rendering of a proper, final bill to the customer for service prior to the customer conversion date. See Locus Reply Aff. ¶¶ 10-13.

Directory Listings. As for supposed loss of directory listings, the Texas PUC put this issue to bed more than a year ago, when SWBT implemented order processing changes that had been negotiated with CLECs as part of the Texas collaborative process. Insofar as the Texas record reflects, this issue has not arisen since then; the CLEC comments on which DOJ relies provide no insight on this issue of timing. See Rogers Reply Aff. ¶ 5-12.

DOJ Concern: Loop provisioning issues are of concern principally because of their appearance at the relatively low volumes of orders that CLECs have generated to date, and because the processing problems appear to be growing with even a modest trend of increasing order volume. Evaluation at 42-44.

As explained above, there is little correlation between those months with the highest transaction volumes and those months with the least good performance. Moreover, the DOJ seeks to overturn the core conclusion of the Texas OSS test that SWBT's systems process CLEC transactions in a nondiscriminatory fashion, and can do so at reasonably foreseeable levels of demand. The Department's purely paper case is far too weak to overcome conclusions reached after years of hands-on proceedings, testing, and investigation in Texas.

V. NONDISCRIMINATORY INTERCONNECTION TRUNKING

To carry traffic between SWBT and CLEC locations, SWBT has provisioned nearly 348,000 interconnection trunks. Habeeb Attach. E. More than half of these trunks were provisioned in 1999. Habeeb Reply Aff. ¶ 27. To ensure nondiscrimination, SWBT provisions these trunks using the same equipment, interfaces, technical criteria, and service standards that are used for SWBT's own retail trunks. If used to capacity, the existing trunks would be capable of serving millions of facilities-based CLEC lines.

SWBT conducts extensive performance monitoring of its interconnection trunking arrangements. Relevant measures track average installation intervals, missed due dates, the length of delays, trunk blockage, and trunk restoration intervals. Across Texas, SWBT has bettered the parity levels and benchmarks for all measurements for most of the months for which results are available, thus demonstrating nondiscriminatory service. In the rare instance where the data have indicated performance issues, SWBT has investigated and added the necessary extra capacity or otherwise resolved the technical difficulties or performance calculation issues that have been discovered. The Texas PUC specifically reviewed SWBT's performance data, as well as SWBT's trunk forecasting, ordering, and provisioning processes, during its supplemental proceedings in November and December 1999. At the conclusion of that extra review and after recommending numerous improvements (which SWBT promptly implemented) and performance reporting changes, the Texas Commission confirmed its prior conclusion that SWBT meets the checklist requirements in this area. Texas PUC Evaluation at 10-16; SBC Br. at 78-81.

DOJ Concern: SBC has limited the number of trunks that a CLEC can order. Evaluation at 45.

The Department is incorrect. In the context of installing hundreds of thousands of trunks for CLECs, SWBT has recommended guidelines for managing trunk orders to ensure that SWBT

can expand its own tandem trunk capacity to meet CLECs' needs. See Deere Aff. ¶ 50. The Texas PUC also considered and found nondiscriminatory a non-binding network management guideline suggesting that CLECs order no more than 12 DS1 trunks per day per Texas market area. See Texas PUC Evaluation at 13. Deere Reply Aff. ¶ 7. There is no firm limit, and SWBT will agree – and has agreed – to accept trunk orders in excess of the recommended cap. Deere Reply Aff. ¶¶ 7-9. The Texas PUC found that SWBT's policy is not discriminatory. Texas PUC Evaluation at 13. Isolated shortages of facilities for additional interconnection with CLECs have been addressed as they have arisen, through Texas PUC proceedings and a collaborative trunking forum. See Deere Aff. ¶¶ 50; see also Evaluation at 46 & nn.126, 127. In addition, the Texas PUC has established a trunking forum, including the Texas PUC staff as well as SWBT and interested CLECs, to address both routine trunking issues and emergency situations on an ongoing, collaborative basis. Deere Aff. ¶ 50; Texas PUC Evaluation at 11-12.

DOJ Concern: SBC has extended the time it takes to process CLEC trunk orders. Evaluation at 45.

The Department's vague allegation has no credible support at all. DOJ appears to be challenging the Texas PUC's benchmark for trunk installation. DOJ Evaluation at 45 n.124. Yet DOJ makes no effort to show that the benchmark is unreasonable, as would be required to overcome the state commission's judgment. See New York Order ¶ 56. Indeed, the Texas Commission's 20-day interval (see PM 78) compares favorably to the standard in New York, where the installation intervals for forecasted trunks are 18 to 30 days. See Joint Declaration of George S. Dowell and Julie A. Canny, CC Docket No. 99-295, Attach. B at 139 (FCC filed Sept. 29, 1999); see also New York Order ¶ 71 n.147 (approving Bell Atlantic's installation intervals of 27 to 42 days for large orders as being in parity). And DOJ itself notes that SBC has issued clear guidance to its service representatives not to extend due dates by having the customer supplement the original order – a step that CLECs are unlikely to take at SBC's request in any event. See Evaluation at 45 n.124.

DOJ Concern: SBC has missed installation dates. Evaluation at 45.

As reported in PM 78, SWBT met the Texas PUC's 20-day installation benchmark in 4 of the 5 months from August to December, 1999. SWBT has also provided parity-or-better performance for missed due dates (PM 73), average delay days (PM 74), and SWBT-caused missed due dates greater than 30 days (PM 75) in all five of the relevant months. The actual numbers underlying this measure are especially noteworthy. In December 1999, SWBT missed more than half of the due dates for its own retail trunks, but made 90% of its due dates for CLEC trunks.

DOJ Concern: Performance data, even though it appears compliant with relevant parity and benchmark standards, does not refute CLEC complaints. Evaluation at 47-48.

This allegation encapsulates the problems with the Department's entire Evaluation. DOJ here asks the Commission to ignore hard performance data that admittedly shows "complian[ce] with the relevant parity and benchmark standards," Evaluation at 47, in favor of reliance on "the complaints of the CLECs," id. This is precisely what the Commission said in the New York Order it would not do. New York Order ¶¶ 56-59. DOJ commits a double sin. It ignores not

only the Commission's analytic approach, but also the expert assessment of the state commission, which devoted a five-page discussion specifically to this issue, explaining that past trunking problems have been resolved through the collaborative process. Texas PUC Evaluation at 11-16. Although the Department dismisses these findings with breezy language about "optimistic prediction," Evaluation at 49, it is the Department that overlooks the current facts. SWBT has provided performance data, calculated in accordance with Texas PUC rules, that shows consistent parity performance. The state commission's hands-on investigation of CLEC complaints shows them to be outdated or unfounded. When both the numbers and the state commission's investigation agree, it is wholly unpersuasive for the Department to claim that further review is needed. See id.

VI. SBC'S WHOLESALE PERFORMANCE IN PROVIDING THE UNE PLATFORM

As noted, SWBT has provisioned more than 166,000 unbundled local loops. Of these 166,000 loops, more than 125,000 have been provisioned with unbundled switching as part of a pre-assembled UNE Platform (*i.e.*, use of SWBT's end-to-end local network to serve a particular line, at cost-based UNE rates). The process of ordering and provisioning the UNE platform has been repeatedly and carefully tested. SWBT's performance has consistently met or exceeded established benchmarks. SBC Br. at 35-38; Texas PUC Evaluation at 54-56.

DOJ Concern: CLECs have complained of weaknesses in the documentation that SBC provides for its EDI interfaces, although the competitive significance is unclear. Evaluation at 49-50.

Telcordia concluded during the Texas PUC's OSS test that SWBT provides clear and comprehensive EDI documentation. See Ham Reply Aff. ¶ 43. More importantly, Texas is not like New York, where the Commission had to rely on KPMG's "psuedo-CLEC" operations to validate Bell Atlantic's documentation. In Texas, 10 CLECs currently are using SWBT's EDI system. Id. ¶ 45. Six of these CLECs are using EDI to process commercial orders. Feb. 9, 2000 Ex Parte. These CLECs' proven ability to build their own interfaces and successfully carry out transactions with SWBT conclusively disprove the vague CLEC allegations cited by DOJ.

DOJ Concern: CLECs have complained that SBC does not adhere to its change management process ("CMP"), although the competitive significance is unclear. Evaluation at 49-50.

Telcordia (working at the Texas PUC's direction) observed SWBT's implementation of one EDI release and validated two others by reviewing documentation and interviewing CLECs. Telcordia found that SWBT's CMP was effective and that SWBT generally followed all requirements. Telcordia also made recommendations for improvements, which SWBT has implemented. Ham Aff. ¶¶ 307, 316, 333; see id. Attachs. LL & MM. This verified record of performance meets the standard set forth in the New York Order, where the FCC cited "a pattern of compliance with the relevant notification and documentation intervals" even though Bell Atlantic had not followed every guideline in every case. See New York Order ¶¶ 113-118. Moreover, unlike the New York plan, a "go/no go" vote gives CLECs – even a minority of

interested CLECs – the ability to postpone SWBT’s introduction of new releases of the EDI interface. CLECs now have had the opportunity to invoke a “go/no go” vote against two EDI releases, but no CLEC has ever voted to delay any release. Ham Aff. ¶¶ 345-351.

DOJ Concern: CLECs have complained about the stability of SBC’s testing environment for new interfaces, although the competitive significance is unclear. Evaluation at 49-50.

Since introduction of SWBT’s updated test environment in November 1999, three CLECs have used the test environment successfully to implement EDI ordering gateways on a commercial basis. Ham Reply Aff. ¶ 45. And there is additional assurance of the ongoing sufficiency of the test environment, as the Texas PUC has charged Telcordia with independently validating SWBT’s test environment. Ham Reply Aff. ¶ 171.

DOJ Concern: There have been disturbing allegations of service outages at the time of conversion to the UNE-platform, but it is unclear to DOJ the magnitude of the problem or how likely it is to increase. Evaluation at 50-52.

The Department ignores the Texas PUC’s resolution of these very same “allegations.” SWBT’s order processing procedures for UNE Platform conversions were designed to fulfill the Texas PUC’s requirements for reliable conversion of all aspects of the customer’s service. The Texas PUC put the complaints now cited by DOJ to the test. At the Texas Commission’s direction, AT&T and SWBT jointly analyzed trouble report data for AT&T’s orders during August and September. All told, only 8 of the 37,000 UNE Platform orders (or 0.02%) experienced a problem attributable to SWBT’s ordering processes – and the cause of those problems has been corrected. Texas PUC Evaluation at 54; see Conway Aff. ¶¶ 58-59; Ham Aff. ¶¶ 196-202. For August through October 1999, trouble reports after 10 days for UNE Platform conversions (using the three-order process) were *lower* (at about 1.5%) than for CLEC orders as a whole (about 1.9%). This is *better* than parity with retail, as more than 2% of SWBT retail orders have trouble reports after 10 days. Ham Aff. ¶¶ 200-201. Performance data for November and December show trouble rates of less than 2% for UNE Platform conversions, as compared to trouble rates above 2% for SWBT’s own retail orders. Ham Reply Aff. ¶ 72; Feb. 1, 2000 *ex parte* (aggregated performance charts for January and December 1999). As the Texas PUC concluded, “SWBT has acted quickly to address CLEC concerns regarding outages on conversion” and “any potential problems identified by the CLECs in this proceeding have been sufficiently addressed.” Texas PUC Evaluation at 55.